1994

State of Utah v. Roger Van Cleave : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff/Appellee,	)	
	)	Case No. 940115-CA
v.	)	
	)	
ROGER VAN CLEAVE,	)	Priority No. 2
	)	
Defendant/Appellant.	)	**ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT

Appeal from Judgment and Conviction to the Utah State Prison and Sentence for Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 and Theft, a second degree felony, in violation of Utah Code Ann. § 76-6-408, in the Second Judicial District in and for Davis County, the Honorable Rodney S. Page presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES CITED

Page(s)

STATUTES CITED

DETERMINATIVE AUTHORITY

ARGUMENT

1. DEFENDANT, IN THE COURSE OF MEETING HIS BURDEN OF MARSHALING THE EVIDENCE, HAS SHOWN THAT EVEN WHEN THE EVIDENCE IS VIEWED IN A LIGHT MOST FAVORABLE TO THE JURY'S VERDICT, IT IS INSUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION OF BURGLARY *AS A PARTY*.

When challenging the sufficiency of the evidence, a "'[d]efendant has the burden of marshaling all the evidence that supports the verdict, and then showing that, when viewed in the light most favorable to the verdict, the evidence is insufficient.'" *State v. Hayes*, 860 P.2d 968, 972 (Utah App. 1993) (quoting *State v. Vigil*, 840 P.2d 788, 793 (Utah App. 1992), *cert. denied*, 857 P.2d 948 (Utah 1993)). Defendant must marshal all of the evidence in support of the verdict, including all circumstantial evidence, and then persuade the appellate court that, based upon this evidence, the State failed to prove that he was a party to the burglary of the Kjar residence. *See State v. Scheel*, 823 P.2d 470, 472 (Utah App. 1991).

In its Brief, the State argues that Defendant failed to adequately marshal the evidence (Brief of Appellee, pp. 8-9). However, as is set forth in his Brief (*see* Brief of Appellant, pp. 13-19), Appellant specifically marshals all of the evidence *supporting the verdict*. After doing so, Defendant shows that the evidence at trial was woefully short of that required to support a reasonable inference that Defendant had either the mental state or the required conduct, as set forth by statute, for conviction of burglary *as a party*. *See* Utah Code Ann. § 76-2-202; Brief of Appellant, pp. 17-19. In the course of its argument, the State

claims that Defendant omitted five critical facts when marshaling the evidence. These facts, rather than supporting the verdict, actually, when reviewed more closely, support Defendant's position concerning the insufficiency of the evidence.[1]

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[1]The State argues that Defendant omitted the five following facts: (1) the incorrect address on the pawn cards; (2) that Defendant stated that he purchased a guitar from a friend for $5.00, which was valued at approximately $250; (3) that Defendant later stated that he did not know the guitar had been stolen; (4) that Defendant then said that a "friend" had committed the burglary, and that he only pawned the items as a favor; and (5) that Defendant failed to identify his friend when charged.

The address contained on the pawn card referred to in fact number one is an address that is basically the same address as that where Defendant, just a short time before, lived (R. 243-44, Trial Transcript). In fact, the address volunteered by Defendant on the card is only one number different from the correct address (*Id.*). Defendant mistakenly listed the address as "250 East" instead of "200 East", where he lived with his brother and sister-in-law for a short time (*Id.*). If Defendant indeed wanted to provide a false address, he would not have provided an address so close to *his brother's* home where he previously lived.

Facts two, three, and four advanced by the State are completely consistent with Defendant's position, consistently maintained since charges were filed, that a friend had committed the burglary, and that he simply pawned the items as a favor (R. 250-51, Trial Transcript). In its discussion of fact number four, the State confusingly presents Defendant's explanation to his sister-in-law about the pawned items elicited by way of her testimony at trial so as to advance what it propounds is an inconsistency in Defendant's explanation of his knowledge of the burglary. As set forth in his sister-in-law's testimony, the telephone conversation between Defendant and herself took place approximately one or two months prior to trial (R. 250, lines 11-18, Trial Transcript). Because at the time of the conversation Defendant knew of the burglary charges against him, he simply told his sister-in-law that he "didn't realize that the guitar was stolen" when he pawned the items (R. 250-51, Trial Transcript). Finally, contrary to the State's argument concerning fact number five, simply because Defendant does not reveal the identity of his friend to the police, does not create an inference that he was a party to the burglary. The aforementioned facts, when taken together, emphasize the consistency of Defendant's explanation of his possession of the stolen items.

Even when the evidence supporting the conviction of burglary, as set forth at pages 15-17 of the Brief of Appellant pursuant to the marshaling requirement, is viewed is a light most favorable to the jury's verdict, it is insufficient to support Defendant's conviction of burglary *as a party*. The evidence, even when so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. Such a reasonable doubt is evidenced by the jury's written communication with the trial court during its deliberations. The note from the jury stated, "What does 'party' mean in regards to when a person became aware of a crime? Is a person a "party" to burglary if they are aware of the crime after it was committed, or do they have to be aware of it before hand? Or during? Help" (R. 86) (emphasis included).

As set forth in it's Brief, the State's case hinges on the inferences to be drawn from Defendant's close proximity to the Kjar residence by way of his construction work at the Kjar home around the time of the burglary, and that Defendant, shortly after the burglary, pawned a portion of the stolen property.[2] These events, taken together with the other evidence marshaled above, establish no probative inference that Defendant, as a party to the burglary, acted with the same mental state as the person who entered or remained

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[2] *Cf. State v. Smith*, 726 P.2d 1232, 1235 (Utah 1986) (holding that "[t]he mere possession of stolen property unexplained by the person in charge thereof is not in and of itself sufficient to justify a conviction of larceny of the property . . . .")

unlawfully in the residence and solicited, requested, commanded, encouraged, or intentionally aided the person in entering or unlawfully remaining in the Kjar residence with intent to commit theft. "Criminal convictions cannot rest on conjecture or supposition; they must be established by proof beyond a reasonable doubt." *See State v. Workman*, 852 P.2d 981, 987 (Utah 1993) (noting that the State's argument that "speculative inferences can constitute proof beyond a reasonable doubt is to attack one of the most sacred constitutional safeguards at its core").

2. BECAUSE TRIAL COUNSEL'S ACTIONS DID NOT CONSTITUTE AN ACTIVE, AS OPPOSED TO A PASSIVE, WAIVER OF AN OBJECTION, THIS COURT SHOULD CONSIDER THE TRIAL COURT'S ERROR IN INSTRUCTING THE JURY UNDER PLAIN ERROR TO AVOID MANIFEST INJUSTICE.

The State argues that the failure to object to the instruction precludes appellate review. *See* Brief of Appellee, pp. 18-20. By so arguing, the State fails to recognize that trial counsel's actions did not constitute an active representation that there was no objection to clarify the instruction in response to the jury's inquiry for clarification.

The Utah Supreme Court, in *State v. Medina*, 738 P.2d 1021 (Utah 1987), declined to review a challenge to a jury instruction under the manifest or plain error exception. In that case, trial counsel "actively represented to the court that she had read the instruction and had no objection to it . . ." and thereby "consciously chose not to assert any objection that might have been raised and affirmatively

led the trial court to believe that there was nothing wrong with the instruction." *Id.* at 1023.[3]

In *State v. Bullock*, 791 P.2d 155 (Utah 1989), the supreme court declined to review a challenge under plain error concerning trial counsel's failure to seek exclusion of testimony at trial. The basis for declining to review the challenge was based upon the conscious strategy to challenge the quality rather than the admissibility of the State's evidence. Such a consciously chosen strategy was evidenced, among other things, by trial counsel's cross-examination of the State's witnesses and presentment of countervailing testimony of defense experts. *Id.* at 160. In the course of its ruling, the supreme court stated:

> The plain error rule permits the appellate court to assure that justice is done, even if counsel fails to act to bring a harmfully erroneous ruling to the attention of the trial court. But if a party through counsel has made a conscious decision to refrain from objecting or has led the trial court into error, we will then decline to save that party from the error. This flexibility is inherent in the plain error rule. "[T]he plain error . . . test . . . ultimately permit[s] the appellate court to balance the need for procedural regularity with the demands of fairness."

Id. at 158 (quoting *State v. Verde*, 770 P.2d 116, 121 (Utah 1989)).

In the instant case, trial counsel, prior to the jury's

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[3]*See also State v. Blubaugh*, 904 P.2d 688, 700 (Utah App. 1995), where this Court declined to review a jury instruction challenge under the manifest injustice exception because trial counsel agreed that the instruction was a correct statement of the law and did not specifically object to the instruction, but merely offered an alternative.

deliberations, did not object to the instructions utilized to instruct the jury about the requirements of convicting Defendant as a party to burglary. Further, during the in-chambers conference concerning the note received from the jury, in which Defendant was not present, trial counsel merely said "alright" when the trial court confusingly suggested that the jury be referred to Jury Instruction No. 22, the same instruction with which they had been previously instructed.[4] This is the same instruction given to the jury prior to its deliberations and its note[5] to the trial court, which was sent shortly after deliberations began, in which the jury sought guidance from the court as to what is required in terms of a person's awareness to be guilty of burglary as a party. The jury's note evidences the doubts entertained by the jury about imposing criminal liability as a party in the instant case where the evidence consistently shows, at the very most, that Defendant was not aware of

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[4]In the course of the in-chambers conference with counsel, the trial court initially recognized the instructions as inadequate to answer the jury's question (R. 349, line 3, Trial Transcript). The trial court then merely referred the jury to the previously utilized Jury Instruction No. 22, which states: "You are instructed that in every crime or public offense, there must be a union or joint operation of the act or intent (R. 86-87). As support for the trial court's use of the language in Jury Instruction No. 22, the State cites *State v. Maestas*, 652 P.2d 903 (Utah 1982). *Maestas*, however, had absolutely nothing to do with party liability for the conduct of another.

[5]Shortly after the jury began its deliberations, the trial court received the following note from the jury: "What does "party" mean in regards to when a person became aware of a crime? Is a person a "party" to burglary if they are aware of the crime <u>after</u> it was committed, or do they have to be aware of it before hand [sic]? Or during? Help" (R. 86) (emphasis included).

the burglary until after the burglary had been committed. Such evidence is not enough to impose criminal liability as a party under § 76-2-202. By failing to instruct the jury that one cannot be convicted as a party of burglary if that person is not aware of the conduct that constitutes the burglary until after it is committed, the trial court breached its duty to instruct the jury on the law applicable to the facts of the case. *See State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992) (citing *State v. Potter*, 627 P.2d 75, 78 (Utah 1981)). The trial court's failure is especially troubling when considered in light of the trial court's own acknowledgment that the instructions were inadequate to answer the jury's question and the trial court's confusion about party liability under Utah law as evidenced by the in-chambers conference (*See* R. 348-50, Trial Transcript).

The instant case, in light of the aforementioned circumstances, is particularly compelling for applying the plain or manifest injustice doctrine. Such circumstances not only warrant review by way of the plain error or manifest injustice doctrine but they also warrant reversal of Defendant's conviction of burglary as a party.

CONCLUSION

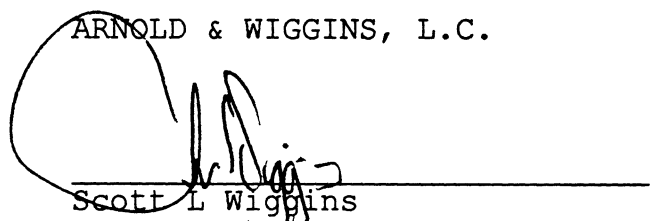
Based on the foregoing, Defendant respectfully asks that this Court reverse Defendant's conviction of burglary and remand the case for a new trial with instructions to correct the errors committed in the course of his trial.

STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant requests oral argument because oral argument will materially enhance the decisional process due to the significant issues in the instant appeal dealing with principles concerning sufficiency of evidence, circumstantial evidence, and what is required for conviction as a party to a crime, which are matters of continuing public interest and which involve issues requiring further development in the area of criminal law case development. Counsel for Defendant further requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official Publication" for purposes of precedential value and instruction in future cases.

RESPECTFULLY SUBMITTED this 8th day of January, 1997.

ARNOLD & WIGGINS, L.C.



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CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed two (2) true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid, to the following, on this 8th day of January, 1997.

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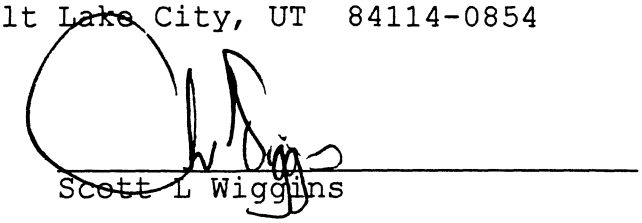

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